

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14**

SmithFoods Pacific, Inc.

Employer

and

**International Brotherhood of
Teamsters, Local 688**

Petitioner

Case 14-RC-271503

DECISION AND DIRECTION OF ELECTION

On January 19, 2021,¹ International Brotherhood of Teamsters, Local 688 ("Petitioner") filed its original petition in this case with the National Labor Relations Board ("Board") under Section 9(c) of the National Labor Relations Act ("Act"). By this petition, Petitioner seeks to represent certain employees employed by SmithFoods Pacific, Inc. ("Employer") at its facility currently located in Pacific, Missouri,² where the Employer produces various ice cream products. There are less than 40 employees in the stipulated bargaining unit.

The only matter at issue is whether the election should be conducted by manual or mail-ballot method. Election arrangements, including the voting method, are not litigable matters at a pre-election hearing. Sec. 102.66(g)(1) of the Board's Rules and Regulations. See also, Representation-Case Procedures, 84 Fed. Reg. 69524, 69544 fn. 82 (Dec. 18, 2019) (citing *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1367 (1954)). On February 2, the parties entered into a stipulated record and shortly after, pursuant to that stipulation, the Employer submitted its position to me on the voting method and details of election.

Based on the stipulated record, having reviewed the parties' positions,³ and having considered the factors discussed below, I have determined that because of the

¹ All dates are in 2021 unless otherwise noted.

² The parties stipulated that an appropriate unit for collective bargaining "includes all full-time and regular part-time custodians, warehouse employees, production employees, lab employees, maintenance employees, processing employees, quality assurance employees, and blenders employed by the Employer at its facility located at 20 Midwest Drive, Pacific, Missouri, and excludes all temporary employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act."

³ The Union did not submit a position separate from the proposed election details on the face of its petition.

current status of the COVID-19 pandemic in the relevant region, particularly the high testing positivity rate, the Board will conduct this election by mail ballot.

POSITIONS OF THE PARTIES

The Employer does not contend that COVID-19 is no longer an issue in the community but asserts that a manual election can be accomplished in a safe manner, complying with guidelines set forth by the U.S. Centers for Disease Control and Prevention (“CDC”), and “without risk of exposure to COVID-19.” It will also comply with the suggested manual election protocols set forth in General Counsel Memorandum 20-10 (“GC Memo 20-10”). The Employer proposes in-person polling take place in the employee breakroom, a 28-foot by 20-foot room, and states “the HVAC system for the building is designed to maximize the air exchange rate” but did not provide any details regarding air circulation, including the height of the breakroom. It also proposes a manual election take place over three hours, one 1-hour session and one 2-hour session, on April 1 due to scheduled spring breaks during the weeks of March 15 and March 22 for local school districts. It did not indicate how many of its employees have children in the local school systems or provide a rationale for why the Board could not conduct the election in the four weeks preceding March 15.

On the face of its petition, Petitioner proposes a manual election consisting of one 3-hour session at the Employer’s facility on February 16.

THE BOARD’S STANDARD

On November 9, 2020, the Board set forth “six situations that suggest the propriety of mail ballots due to the Covid-19 pandemic,” noting that “[w]hen one or more of these situations is present, a Regional Director should consider directing a mail-ballot election.” *Aspirus Keweenaw*, 370 NLRB No. 45, slip op. at 1 (2020). Those six situations are:

- 1) The Agency office tasked with conducting the election is operating under “mandatory telework” status;
- 2) Either the 14-day trend in the number of new confirmed cases of Covid-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher;
- 3) The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size;
- 4) The employer fails or refuses to commit to abide by the GC Memo 20-10 protocols;
- 5) There is a current Covid-19 outbreak at the facility or the employer refuses to disclose and certify its current status; and

6) Other similarly compelling considerations.

Id.

As the Board acknowledged, no Regional Office, including Subregional and Resident Offices, has been in a mandatory-telework status since mid-June 2020. The Employer's proposed polling place does not appear to violate any mandatory state or local health orders and, as noted above, it has committed to abide by the protocols in GC Memo 20-10.

Over the past 90 days, the Employer reports that four employees "tested positive for COVID-19 and/or were subject to quarantine for any reason related to COVID-19"—three in November 2020, one in December 2020, and none in January 2021.⁴ I note that this is over 10% of the stipulated unit.

In *Aspirus*, the Board instructed Regional Directors to "generally focus their consideration on recent statistics that reflect the severity of the outbreak in the specific locality where the election will be conducted" and stated that "a mail-ballot election will normally be appropriate if either (a) the 14-day trend in the number of new confirmed Covid-19 cases in the county where the facility is located is increasing, or (b) the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher."⁵ Id. slip op. at 5.

The Employer's Pacific facility, where a manual election would take place, is located in Franklin County, Missouri, less than 2 miles from St. Louis County and Jefferson County.⁶ As of February 8, the Missouri Department of Health reported a 10.1% testing positivity rate for Franklin County based on a 7-day rolling average while St. Louis County and Jefferson County were at 7.5% and 10.5%, respectively.⁷ Neither

⁴ The Employer did not indicate if any employees quarantined but did not test positive.

⁵ As explained by Johns Hopkins University: "On May 12, 2020 the World Health Organization (WHO) advised governments that before reopening, rates of positivity in testing (i.e., out of all tests conducted, how many came back positive for COVID-19) should remain at 5% or lower for at least 14 days." <https://coronavirus.jhu.edu/testing/testing-positivity> (accessed February 8). In other words, a locality with a testing positivity rate over 5% in one of the preceding 14 days normally warrants a mail-ballot election.

⁶ The City of Pacific, Missouri, straddles Franklin County and St. Louis County. See generally, *Bud Antle, Inc.*, 359 NLRB 1257, 1257 fn. 3 (2013) (taking administrative notice of distance between two cities based on Google Maps), reaffirmed and incorporated by reference 361 NLRB 873 (2014).

⁷ "Public Health Dashboard" (updated February 8). State of Missouri. <https://showmestrong.mo.gov/data/public-health/> (accessed February 8) ("The 7-day range reflects 1/30/2021 through 2/5/2021. A delay allows daily data to be accurate and complete."). I note that Franklin County reported a 10.8% testing

party has suggested that the United States Postal Service in Greater St. Louis is unable to deliver mail, that the stipulated employees would be unable to understand the mail balloting procedure, that the addresses of the eligible employees are not known or up to date, or that there are any impediments to voter participation.

As the testing positivity rate in Franklin County, along with the rates in nearby St. Louis County and Jefferson County, exceeds the Board's standard of 5%, a mail-ballot election is warranted. The similar positivity rate among employees in the stipulated bargaining unit also supports a mail-ballot election.⁸

CONCLUSIONS

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.⁹
2. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

positivity rate "from the MO website" as of February 8. "Missouri Novel Coronavirus Information." Franklin County, Missouri. <https://www.franklinmo.org/covid19> (accessed February 8).

⁸ The Board has issued orders denying review of Regional Directors' direction of mail-ballot elections in similar circumstances. See, for example, *Amazon.com Services, LLC*, 10-RC-269250 (Feb. 5, 2021) (unpublished) (county positivity rate over 17% with unit rate of 2.88%); *Twin City Foods, Inc.*, 19-RC-265696 (Jan. 19, 2021) (unpublished) (county rate over 5% with increasing trend); *Hearthside Food Solutions, Inc.*, 08-RC-264349 (Dec. 1, 2020) (unpublished) (state rate over 15%); *Riverview Care Center*, 14-RC-265356 (Nov. 30, 2020) (unpublished) (city rate over 10%); *Lazarus Energy Holdings, LLC*, 16-RC-266439 (Nov. 24, 2020) (unpublished) (county rate over 8%); *Flex-N-Gate Chicago, LLC*, 13-RC-265966 (Nov. 23, 2020) (unpublished) (city rate over 10%).

⁹ The parties stipulated to the following commerce facts:

SmithFoods Pacific, Inc., a Missouri corporation with its principal offices located at 20 Midwest Drive, Pacific, Missouri, the only facility involved, is engaged in the manufacture of food products. During the past 12 months, a representative period of time, the Employer purchased and received goods valued in excess of \$50,000, which goods were shipped directly to its Pacific, Missouri facility from points located outside the State of Missouri.

4. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time custodians, warehouse employees, production employees, lab employees, maintenance employees, processing employees, quality assurance employees, and blenders employed by the Employer at its facility located at 20 Midwest Drive, Pacific, Missouri

Excluded: All temporary employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act

DIRECTION OF ELECTION

The Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **International Brotherhood of Teamsters, Local 688**.

A. Election Details

The election will be conducted by mail. The ballots will be mailed to employees employed in the appropriate voting group at 3:00 p.m. on **Monday, February 22, 2021**, from the office of the National Labor Relations Board, Subregion 17 – 8600 Farley Street – Suite 100, Overland Park, Kansas 66212-4677. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **Monday, March 1, 2021**, or otherwise requires a duplicate mail ballot kit, should communicate immediately with the National Labor Relations Board by calling the Subregion 17 office at (913) 275-6525.

The ballots will be commingled and counted by the Region 14/Subregion 17 office at 2:00 p.m. CT on **Monday, March 8, 2021**. In order to be valid and counted, the returned ballots must be received by the Region 14/Subregion 17 office prior to the counting of the ballots. The parties will be permitted to participate in the ballot count, which will be held by videoconference. A meeting invitation for the videoconference will be sent to the parties' representatives prior to the count. No party may make a video or audio recording or save any image of the ballot count.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **January 30, 2021**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be received by the Regional Director and the parties by **Thursday, February 11, 2021**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word (.doc or .docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

The list must be filed electronically with the Subregion and served electronically on the other parties named in this decision. The list must be electronically filed with the Subregion by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

February 9, 2021

Pursuant to Section 102.5(c) of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site (www.nlrb.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

DATED at St. Louis, Missouri, this 9th day of February 2021.



William B. Cowen, Acting Regional Director
National Labor Relations Board, Region 14
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